BANK BURUH (M) BHD.

v.

JEAN LOUIS JAYARAJ SELVAM & ANOR.

HIGH COURT MALAYA, KUALA LUMPUR
MOHAMED DZAIDDIN J
[ORIGINATING SUMMONS NO. F33 OF 1980]
4 MARCH 1983

LAND LAW: *Charge - Application by chargor - Declaration of amount payable - Refund of amount overpaid - Whether further interest to be calculated on monthly rests - Form 16D notice of demand already issued.*

The applicants (chargors) applied for an order that the amount of charge be declared as RM686,914.37 and the chargee, Bank Buruh (Malaysia) Berhad ("the Bank"), be ordered to refund the sum overpaid by the applicants under the order of Court dated 15 April 1981. The applicants contended that the Bank was not entitled to charge further interest at 12% per annum calculated on monthly rests once the notice of demand in Form 16D under s. 256 of the National Land Code was issued. The Bank applied to amend the order dated 15 April 1981 to include the words "with monthly rests".

Held:
The Bank was entitled to charge further interest on the balance computed on monthly rests.

(a) In the case before the Court the words "monthly rests" were clearly and expressly mentioned in one of the clauses in the annexure. (*Mary Michael v. United Malayan Banking Corp. Bhd.* [1971] 1 MLJ 172, and *Oversea Chinese Banking Corporation Ltd. v. Tan Cheng Hoe* [1967] 1 MLJ 98 distinguished).

(b) Even though the statutory notice of demand in Form 16D did not mention the words "monthly rests", the chargors were still caught by the clause in the annexure. The parties were bound by the annexure which clearly spelt out their rights and obligations.

[Application of the chargors dismissed. Application of the Bank allowed.]

Cases referred to:
Mary Michael v. United Malayan Banking Corp. Bhd. [1971] 1 MLJ 172
Oversea Chinese Banking Corporation Ltd. v. Tan Cheng Hoe [1967] 1 MLJ 98

Legislation referred to:
National Land Code 1965, s, 256

For the applicant - S. Narayanan; M/s. Ng Ek Teong & Partners
For the respondents - P. Abraham; M/s. Abraham & Partners

JUDGMENT

Mohamed Dzaiddin J:

In this Summons-in-Chambers, the applicants who are the chargors applied for an order that the principal amount of the charge with interest thereon at 12% per annum from 20 September 1978 to 8 June 1981 be declared as RM686,914.37 and, as such, the Bank be ordered to refund the sum of RM43,919.23 to them being the sum which they have overpaid under the order of Court dated 15 April 1981.

The applicants contended that the said sum was overpaid because the redemption sum was calculated with interest payable on monthly rests. They said the Bank was not entitled to charge further interest at 12% per annum calculated on monthly rests once the notice of demand in Form 16D under s. 256 of the National Land Code was issued.

The issue arose as a result of default by the applicants to pay money owed by them to the Bank. The Bank granted an overdraft facility to Selvam Holdings (Malaysia) Sendirian Berhad, and in consideration of the said facility, a third party charge was created in favour of the Bank secured by the properties belonging to the applicants. Clause 1 of the annexure to the charge states that the Chargors on demand will pay to the Bank all sums of money due or owing by the said company together with interest thereon at the rate of twelve (12) per centum per annum with monthly rests. The clause further states:

> And if when the said account or accounts current or otherwise shall be closed either by demand as aforesaid or by the death of Chargor(s) (or where the Chargor(s) shall be more than one person by the death of any one of them) **a balance shall be owing to the Bank by the Customer(s) the Chargor(s)** or the personal representatives of the Chargor(s) as the case may be will so long as the same or any part thereof shall remain owing pay to the Bank interest **thereon at the Prescribed Rate with monthly rests computed from the time when such balance shall have been ascertained** and the Chargor(s) agree(s) that the statement of the Manager Assistant Sub-Manager Accountant or any other Officer of the Bank as to the amount of such balance shall be final and conclusive. (The emphasis is mine).

Counsel for the applicants relies on two decided cases. It is contended that the case of *Mary Michael v. United Malayan Banking Corp. Bhd* [1971] 1 MLJ 172 applies. In that case, the Federal Court considered two grounds, one or which is relevant to this case, namely, that the bank had no right to increase the interest from 9.6% per annum to 11% per annum and interest should have been on simple interest. Azmi LP stated at p. 173 as follows:

> The next ground of appeal is that the learned Judge, having held that the bank not being entitled under the law to charge increased interest, should have ordered an account to be taken between the parties to ascertain the present amount due, and also that the learned Judge should not have ordered interest with monthly rests after the account has been closed by serving the notice dated 3 August 1968. Before us Counsel for the bank conceded that only simple interest should be charged after the closing of the account as at 3 August 1968, and that she would therefore offer no objection to the taking of the accounts to ascertain the amount due. I would therefore direct that the rate of interest be at 9.6% simple interest per annum with effect from 4 August 1968 to 2 April 1970 and that the accounts be taken between the parties to ascertain the correct amount due.

It appears to me that the memorandum of charge did not mention anything about interest calculated on monthly rests. Only Form 16D notice did specify the increased rate with monthly rests. On this basis, Counsel for the Bank has rightly conceded that only simple interest should be charged.

The next case referred to was *Oversea Chinese Banking Corporation Ltd. v. Tan Cheng Hoe* [1967] 1 MLJ 98. In this case, the bank instituted a foreclosure action under s. 256 of the National Land Code. The question for consideration was whether upon the chargor's death the bank was entitled to charge interest on the balance owing on monthly rests or on simple interest. Reference was made to the clause of the charge which is expressed in these words:

> AND if, when the said current account shall be closed either by service of such notice in writing as aforesaid or by my death, a balance shall be owing to the bank by me, I, or my legal personal representatives, as the case may be, will, so long as the same or any part thereof shall remain owing, pay to the bank interest thereon at the **aforesaid** rate of sixty-five cents (65¢) per dollars one hundred (RM100) per mensum computed from the time when such balance shall have been ascertained: and I agree that the statement of any duly authorised officer or agent or agents of the bank as to the amount of such balance shall be final and conclusive.

The late Ali Hassan J (as he then was) held that in the absence of the term "monthly rests" in the said clause, he was content to say the word "aforesaid" used therein merely refers to the rate of interest and nothing more and, as such, the bank was only entitled to charge simple interest.

In my opinion, the above cases can be distinguished with the present one. The issue in the two cases mentioned was the omission of the words "monthly rests" in the clause of the annexure which raised some ambiguity in the interpretation of the documents. However, in the instant case, the words "monthly rests" are clearly and expressly mentioned in Clause 1 of the annexure, which says that

> so long as the same or any part thereof shall remain owing pay to the Bank interest thereon at the Prescribed Rate with **monthly rests** computed from the time when such balance shall have been ascertained.

In addition, I am also of the opinion that the terms and conditions of the annexure of the charge governed the parties herein. Where the clause of the annexure clearly spelt out the rights and obligations of the parties, the parties are bound by them. It follows therefore even though the statutory notice of demand in Form 16D did not mention the words "monthly rests", the chargors are still caught by the clause in the annexure. Clause 1 of the said annexure gives the chargee the right to compute interest on monthly rests from "the time when such balance shall have been ascertained ..." until full settlement.

In the circumstances of this application, it is my judgment that the Bank is entitled to charge further interest on the balance computed on monthly rests. I therefore dismiss this application with costs.

To avoid further ambiguity in the matter, I allow the Bank's application to amend the Order of 15 April 1981 by inserting the words "with monthly rests" after the words "per annum" in Clause (a) of the said Order.

Also found at [1983] 1 CLJ 295